IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EILEEN HIPPS and JOHN HIPPS Plaintiffs	:	CIVIL ACTION
v.	:	
BUSCH ENTERTAINMENT CORP. d/b/a SESAME PLACE and WATERWORLD PRODUCTS, INC. Defendants	:	NO. 97-1907

MEMORANDUM

Yohn, J. July , 1997

Plaintiffs Eileen and John Hipps filed this personal injury action after Eileen sustained injuries while riding on the attraction known as "Sky Splash" at Sesame Place amusement park. Plaintiffs' complaint states negligence, strict liability, res ipsa loquitur, breach of implied warranty, and loss of consortium claims against the owner of Sesame Place, defendant Busch Entertainment Corporation, d/b/a Sesame Place (Busch Entertainment), and the manufacturer of Sky Splash, Waterworld Products, Inc (Waterworld).

Presently, defendant Busch Entertainment has moved to dismiss plaintiffs' strict liability and res ipsa loquitur claims--Counts II and III of plaintiffs' amended complaint. Busch Entertainment argues that it cannot be liable on the basis of strict liability because it is not engaged in the business of selling a product, but rather is in the business of providing a service. Further, Busch Entertainment contends that negligence cannot be inferred from the circumstances surrounding the

incident because other possible causes of Eileen Hipps' injuries exist.

For the reasons that follow, Busch Entertainment's motion will be denied in part and granted in part.

I. STANDARD OF REVIEW

When considering a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), the court must accept as true and view in a light most favorable to the plaintiff all allegations made in the complaint. H.J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229, 249 (1989); Rocks v. City of Philadelphia, 868 F.2d 644, 645 (3d Cir. 1989). A motion to dismiss will only be granted if it is clear that relief cannot be granted to the plaintiff under any set of facts that could be proven consistent with the complaint's allegations. Hishon v. King & Spalding, 467 U.S. 69, 73 (1984). "To decide a motion to dismiss, courts generally consider only the allegations contained in the complaint, exhibits attached to the complaint and matters of public record." Pension Ben. Guar. Corp. v. White Consol. Ind., 998 F.2d 1192, 1196 (3d Cir. 1993). Public records include letter decisions of government agencies and published reports of administrative agencies. Id. at 1197. In addition, a court may consider undisputed authentic documents submitted by the defendant if the plaintiff's claims are based on such documents. Id. at 1196.

II. BACKGROUND

On or about May 15, 1995, Eileen and John Hipps, together with their son Sean Hipps (then aged eighteen months) visited Sesame Place amusement park located in Langhorne, Bucks County, Pennsylvania. While at the park, Eileen, John and Sean entered a water amusement ride called "Sky Splash," which involves riding as a group in a giant raft-like tubes through various water sprays, "sky ponds," and water slides. During their ride, Eileen Hipps sustained the following injuries: a herniated disc at L2-3, a chipped L3 vertebral body, lumbar radiculopathy, and other ills. As a result of her injuries, Eileen Hipps has had to undergo medical treatment, and has experienced pain and suffering and a loss of earnings.

On April 30, 1997, plaintiffs filed an eight count amended complaint against Busch Entertainment and Waterworld and on May 22, 1997, Busch Entertainment filed the instant motion to dismiss.

III. DISCUSSION

A. Strict Liability

Busch Entertainment argues that plaintiffs' strict liability claim fails to state a cause of action because a ride on Sky Splash is not a product for the purpose Pennsylvania's strict liability law. Busch Entertainment contends that it neither sold nor leased to Eileen Hipps the instrument that caused her injury in that at no time did Hipps have possession of

the ride, nor did she have the ability to control the speed, direction or length of the ride. Further, Busch Entertainment contends that the policy that underlies the doctrine of strict liability does not apply to the sale of amusement rides.

In Webb v. Zern, 220 A.2d 853 (Pa. 1966), the Pennsylvania Supreme Court adopted § 402A of the Restatement (Second) of Torts, which imposes strict liability on sellers of consumer products for injuries caused by such products. Section 402A provides as follows:

> **Special Liability of Seller of Product for Physical Harm to User or Consumer**
> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or his property, if
> (a) the seller is engaged in the business of selling such a product, and
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
> (2) the rule stated in Subsection (1) applies although
> (a) the seller has exercised all possible care in the preparation and sale of the product, and
> (b) the user or consumer has not brought the product from or entered into any contractual relation with the seller.

Restatement (second) of Torts § 402A. Strict liability, however, does not extend to those persons in the business of supplying only services. See Malloy v. Doty Conveyor, 820 F. Supp. 217, 221 (E.D. Pa. 1993).

Pennsylvania courts have extended the application of the term "seller" to include persons who market a product by

sale, lease or bailment. Francioni v. Gibsonia Truck Corp., 372 A.2d 736 (Pa. 1977). In Francioni, a truck driver, who was injured when he lost control of his vehicle while driving on a highway, filed negligence and strict liability causes of action against the lessor of the truck. Id. at 737. The Pennsylvania Supreme Court reversed the trial court's grant of a compulsory nonsuit in favor of the defendant on the strict liability count, holding that the doctrine of strict liability applies to lessors in the same way as it applies to sellers. Id. at 740. The court concluded that "all suppliers of products engaged in the business of supplying products for use or consumption by the public are subject to strict liability for injuries caused by 'a defective condition unreasonably dangerous to the user or consumer or his property.'" Id. at 739 (emphasis added).

While the definition of seller is expansive, Pennsylvania law still requires that the seller is in the business of selling the specific product alleged to have caused injury. In Musser v. Vilsmeier Auction Co., 562 A.2d 279, 281 (Pa. 1989), the Pennsylvania Supreme Court recognized that the broadened concept of "supplier" had some practical limits when the court refused to expand the definition of supplier to encompass a public auctioneer. The plaintiff in Musser had been injured by a tractor that his father had purchased at a liquidation sale, and the plaintiff had brought a strict liability claim against the auction company that managed the sale. Id. at 279. Although the court noted that strict

liability applies to "anyone who, as a supplier, enters into the business of supplying the public with products which may endanger them[,]" Id. at 281, the court nevertheless concluded that strict liability does not apply to an auctioneer presiding at a liquidation sale because unless the "auctioneer deals exclusively for a manufacturer or business enterprise, or buys and deals regularly in his product, he is a medium and the message but not a regular seller as conceived in 402A." Id. at 283.

Plaintiffs contend that in light of the broad application given to the term "seller" by Pennsylvania law, the Pennsylvania Supreme Court would hold that operators and owners of amusement rides are sellers for the purpose of § 402A in that they are is in the business of supplying a product for use by the public. Here, plaintiffs argue that Busch is in the business of supplying the public with use of the equipment and machinery that comprises the Sky Splash water raft ride, and that Eileen Hipps' injuries were caused by a defect in that product.

Further, plaintiffs allege that the policy reasons that underlie the application of strict liability to sellers of defective products are also implicated in claims against the operators of defective amusement park rides. The Pennsylvania Supreme Court has listed the following factors, which, if applicable, indicate the propriety of the extension of strict liability: (1) whether the defendant is the only member of the marketing chain available to the injured plaintiff for redress; (2) whether the imposition of strict liability would serve as an

incentive to safety; (3) whether the defendant is in a better position than the consumer to prevent the circulation of defective products; and (4) whether the defendant can distribute the cost of compensating for injuries resulting from defects by charging for it in the business. Musser, 562 A.2d at 282.

At this stage of the proceedings it is not possible to tell whether Busch Entertainment is the only member of the marketing chain available to plaintiffs for redress. Although plaintiffs have added Waterworld as a defendant, without further development of the record, the court cannot determine whether plaintiffs have a fair chance of recovering damages from Waterworld.

Further development of the second factor is also necessary to determine whether Busch Entertainment is in a position to influence the manufacturing and design of its amusement rides. Strict liability creates an incentive to improve safety where the defendant has "some ongoing relationship with the manufacturer from which some financial advantage inures to the benefit of the latter and which confers some degree of influence on the [defendant]." Musser, 562 A.2d at 282. Although Busch Entertainment did not manufacture Sky Splash, it is possible that Busch Entertainment and other owners of amusement parks have considerable influence over the design and manufacture of amusement rides, given that there are a limited number of entities in the market to buy such equipment, and each purchase involves considerable expense. For similar reasons, it

may be that Busch Entertainment is in a better position than its customers to prevent the circulation of defective amusement rides.

Finally, a more fully developed record is necessary to determine whether Busch Entertainment can distribute the cost of compensating persons injured on its rides by charging for it in the price of admission to the park. Consequently, there being no direct authority on the issue from the appellate courts of Pennsylvania, the court will deny the motion to dismiss pending further development of the record.

B. Res Ipsa Loquitur

Busch Entertainment argues that Count III of plaintiffs' complaint must be dismissed because negligence cannot be inferred from the circumstance surrounding Eileen Hipps' injury. Busch Entertainment contends that other responsible causes exist for Hipps' injury: Waterworld's alleged defective manufacture and design of Sky Splash.

Section 328D of the Restatement (Second) of Torts, which has been adopted by the Supreme Court of Pennsylvania, provides that

> (1) It may be inferred that harm suffered by the plaintiff is caused by negligence of the defendant when
> (a) the event is of a kind which ordinarily does not occur in the absence of negligence;
> (b) other responsible causes, including the conduct of the plaintiff and third persons, are sufficiently eliminated by the evidence; and

(c) the indicated negligence is within the scope of the defendant's duty to the plaintiff.

Williams v. Otis Elevator Co., 598 A.2d 302, 304-305 (Pa. Super Ct. 1991).

Under the Restatement rule, as adopted by Pennsylvania, "[r]es ipsa loquitur is neither a rule of procedure nor one of substantive tort law. It is only a shorthand expression for circumstantial proof of negligence-- a rule of evidence." Gilbert v. Korvette, 327 A.2d 94, 99 (Pa. 1974). Accordingly, the plaintiff need not prove that the defendant had exclusive management or control of the injury producing instrument. Id. at 101. "[T]he critical inquiry is not control but whether a particular defendant is the responsible cause of the injury." Id. (emphasis in original). Moreover, two or more parties may be inferred liable under res ipsa loquitur where responsibility is invested in and shared by the parties. Id. Additionally, questions of responsibility and control are factual issues to be resolved by the fact finder at trial. Id. at 102 (citing Restatement (Second) of Torts § 328C).

Because res ipsa loquitur is a rule of evidence, the court concludes that there is no need for plaintiffs to allege res ipsa loquitur as a separate count. Consequently, the court will dismiss count III of plaintiffs' complaint. However, plaintiffs have alleged a claim for negligence, and because res ipsa loquitur is simply another way of proving negligence, plaintiffs may proceed on a theory of res ipsa loquitur if it is

appropriate. Plaintiffs have alleged that Eileen Hipps was injured in an accident that would not have occurred but for negligence, that plaintiffs' own negligence can be ruled out because they maintained no control over the ride, and that Busch Entertainment and Waterworld are both responsible for Eileen Hipps' injuries. Whether res ipsa loquitur will be available to plaintiffs at trial will depend on the fact finder's evaluation of the evidence of record, which at this stage of the proceedings has not yet been produced. Of course, if the defective product claim is also proved at trial by plaintiffs against Waterworld it may negate the possibility of establishing one of the elements of res ipsa loquitur; i.e., eliminating other responsible causes, such as the conduct of third persons.

IV. CONCLUSION

Busch Entertainment's motion to dismiss will be denied with respect to Count II of plaintiffs' complaint and granted with respect to Count III.

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EILEEN HIPPS and JOHN HIPPS Plaintiffs	:	CIVIL ACTION
v.	:	
BUSCH ENTERTAINMENT CORP. d/b/a SESAME PLACE and WATERWORLD PRODUCTS, INC. Defendants	:	NO. 97-1907

ORDER

AND NOW, THIS DAY OF July, 1997, upon consideration of defendant Busch Entertainment Corporation, d/b/a Sesame Place's motion to dismiss Counts II and III of plaintiffs' complaint, and plaintiffs' response thereto, **IT IS ORDERED** that defendant's motion is **DENIED** with respect to Count II and **GRANTED** with respect to Count III and Count III is dismissed.

BY THE COURT:

_____

William H. Yohn, Jr., Judge